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No. 96-867

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1996

BLYTHEVILLE COMPRESS CO., INC., *et al.*,

Petitioners,

vs.

BANKERS TRUST COMPANY,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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STATEMENT PURSUANT TO RULE 29.6

Bankers Trust Company is a wholly owned subsidiary of Bankers Trust New York Corporation. The following are Bankers Trust Company's nonwholly owned subsidiaries: Bankers Trust Caribe Capital Markets, Inc.; BT Asia Investment Co., Ltd.; Inversiones BT Foods Ltd.; Amertrust Limited; The World Markets Company GmbH; Thai Investment Securities Public Company Limited; Wan Fu Trading & Consulting Co., Ltd.; Chuan Shin Investment Co. Ltd.; Berz-One, LLC; BT Distribuidora de Titulos e Valores Ltd.; IBKFV Investment Partnership; and Bukor Beteiligungs-und Beratungsgesellschaft mbH & Co. KG.

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INTRODUCTION

Respondent, Bankers Trust Company ("Bankers Trust"), respectfully opposes the Petition For Writ Of Certiorari. The opinion of the United States Court of Appeals for the Sixth Circuit is reported at 89 F.3d 292 (6th Cir. 1996) and is reprinted in Petitioners' Appendix at pages 77-108. The decision of the United States District Court for the Western District of Tennessee is reprinted in Petitioners' Appendix at pages 35-74.

THE PETITION FAILS TO MEET THE REQUIREMENTS OF SUPREME COURT RULE 10 AND SHOULD BE DENIED.

Supreme Court Rule 10 states that "[a] petition for writ of certiorari will be granted only for compelling reasons." The text of the rule sets forth specific reasons that may satisfy this standard, which include decisions by state or federal courts concerning important questions of federal law or conflicts between decisions of various circuit courts of appeal.

First, this action involves the application of state law (primarily the Uniform Commercial Code and state common law) to a dispute between unsecured creditors and a secured creditor of a now-bankrupt mutual debtor. Second, there are no genuine federal law questions in this diversity case. Third, the decision of the court of appeals in this case is not in conflict with any decision of another United States court of appeal. Finally, the parties submitted this case to the district court on cross-motions for summary judgment. The district court properly reviewed and evaluated the record, which includes (i) submissions of undisputed facts by each of the parties and (ii) expert affidavits filed by Respondent. Summary judgment was properly awarded in accordance with *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). Petitioners have had a fair and adequate

consideration of the issues in the courts below. This case history presents no compelling reason for review by this Court.

The Petition does not demonstrate that any of the criteria of Rule 10 are met given the facts and issues of this case. Accordingly, Respondent respectfully submits that the Petition should be denied.

COUNTERSTATEMENT OF THE CASE

The issues in this case are governed by the Uniform Commercial Code ("UCC") and state common law — **not** by the United States Warehouse Act (the "Warehouse Act"). The dispute involves claims by unsecured creditors (the "Warehouses") against a secured creditor (Bankers Trust) of a mutual debtor ("The Julien Company" or "TJC"). To avoid the results dictated by the UCC and state common law, the Warehouses seek to create a contract between themselves and Bankers Trust for the payment of services rendered by the Warehouses to and for benefit of TJC.

The Julien Company was formerly one of the largest cotton merchandising companies in the world. During the course of its business, TJC acquired ownership of thousands of bales of cotton stored in warehouses by purchasing negotiable warehouse receipts. Bankers Trust, along with several other lenders, financed TJC's cotton merchandising business. Bankers Trust and the other lenders required TJC to pledge its warehouse receipts as collateral for this financing. In order to perfect their security interests in TJC's warehouse receipts, Bankers Trust and the other lenders required TJC to deliver physical possession of the warehouse receipts to L&S Cotton Systems, Inc. ("L&S"), collateral sub-custodian for Bankers Trust and the other lenders.

Each Warehouse in this case stored TJC's cotton. Each

Warehouse released and shipped TJC's cotton, upon TJC's request and direction, without first being paid by TJC for accrued storage charges despite having the legal right to refuse to ship the cotton until their storage charges were paid. The Warehouses knowingly waived their statutory lien rights by releasing the cotton and invoiced TJC for their charges. TJC never paid the charges and was later forced into bankruptcy.

After being unsuccessful in collecting the charges from TJC or the TJC bankruptcy estate, the Warehouses initiated this action in the district court claiming that Bankers Trust owed the storage charges as a party to an express or implied contract with each of the Warehouses. Following discovery, the Warehouses and Bankers Trust each submitted statements of undisputed facts, exhibits, affidavits, and deposition transcripts to the district court and filed cross-motions for summary judgment. United States District Judge Jerome Turner found that there were no material facts in dispute and granted Bankers Trust's motion for summary judgment dismissing the entire case.

In pertinent part, Judge Turner ruled that (i) under federal or state law, no contract — express or implied — existed between the Warehouses and Bankers Trust obligating Bankers Trust to pay TJC's debts, (ii) Bankers Trust's use of a standard bank transmittal letter to forward negotiable warehouse receipts to the Warehouses was commercially reasonable and necessary under the UCC to protect Bankers Trust's security interest in the negotiable warehouse receipts, and (iii) pursuant to UCC §§ 9-304(2), 9-305 and 9-317, and established case law, Bankers Trust's use of a bank transmittal letter did not obligate Bankers Trust to pay TJC's cotton storage charges.

The court of appeals affirmed the district court's judgment and agreed that a secured lender holding negotiable documents of title merely to protect its security interest in accordance with

the requirements of Article 9 of the UCC does not become contractually liable for its borrower's debts. The court of appeals denied the Petitioners' request for a rehearing and their suggestion for a rehearing *en banc*.

CORRECTION OF MISSTATEMENTS OF FACT OR LAW IN THE PETITION

Pursuant to Supreme Court Rule 15.2, the following are misstatements of fact or law in the Petition:

(a) At page 2, Petitioners wrongly claim they provided warehousing services for Bankers Trust. Both the district court and the court of appeals specifically determined that Petitioners provided warehousing services for **TJC** — not Bankers Trust.

(b) At page 3, Petitioners' mischaracterize the language contained in the Petitioners' schedule of charges and rules. None of the Petitioners' schedule of charges and rules discuss 'liability' for warehouse charges. Furthermore, Petitioners fail to mention that at least two (2) Petitioners' schedule of charges and rules do not designate any party from whom the warehouse will seek payment for warehouse charges.

(c) Contrary to Petitioners' statement at page 4, federal question jurisdiction concerning the interpretation and enforcement of the United States Warehouse Act, 7 U.S.C. § 241 *et seq.*, was **never** asserted or claimed in the Petitioners' complaint filed in this action. The sole basis for jurisdiction alleged in Petitioners' complaint was diversity of citizenship pursuant to 28 U.S.C. § 1332.

(d) At page 4, Petitioners for the first time incorrectly assert that this Court "has consistently decided in its judicial opinions that a filed and published [warehouse] tariff such as those filed in this case has the enforceability of law." Petitioners fail to cite even one prior decision of this Court (or any other court) to support this unwarranted assertion.

(e) Beginning at page 5, Petitioners distort U.S.D.A. regulation, 7 C.F.R. § 735.29. By the 'artful' use of ellipses and the intentional omission of critical language from the quoted regulation, Petitioners seek to obfuscate that the Warehouse Act regulations *only* apply to warehouses licensed or seeking to be licensed under the Warehouse Act. The following is a *complete*, unedited quote of the first two sentences of 7 C.F.R. § 735.29, with the portions omitted by Petitioners italicized:

> *A licensed warehouseman shall not make any unreasonable, exorbitant, or discriminatory charge for services rendered. Before a license to conduct a warehouse is granted under the act,* the warehousemen shall file with the Department a copy of his rules, if any, and a schedule of the charges to be made by him *if licensed.*

The omitted language clearly shows that this particular regulation only applies to federally-licensed warehouses. As noted herein at footnote 2, page 9, thirteen (13) of the twenty-eight (28) Petitioners are **not** federally-licensed.

Further, as discussed herein at footnote 1, page 8, Petitioners omit a critical section of this regulation

dealing specifically with warehouse charges and the regulation's directive that even federally-licensed warehouses should look to state laws for collecting unpaid warehouse charges. Thus, a reading of the entire regulation shows that it seeks to prohibit federally-licensed warehouses from engaging in harmful pricing practices; it is not intended to arm warehouses with extraordinary collection powers. This is the first time the Warehouses have asserted that collection of charges by *both* federally-licensed and state-licensed warehouses are solely governed by the U.S.D.A. regulations to the exclusion of the UCC and other state law.

(f) Petitioners' assertion at page 7 that the Interstate Commerce Act is controlling — an assertion raised for the first time in the Petition for Rehearing and Suggestion for Rehearing En Banc and the primary basis of this Petition — is a gross misstatement of the law.

(g) At page 10, Petitioners seek to distort the meaning of the term "shipper" in their schedules of charges and rules. Petitioners erroneously suggest that the term "shipper" means the person who "shipped *the warehouse receipts*" to the warehouse. Petitioners then use this distortion to imply that Bankers Trust was the "shipper" under their schedule of charges and rules because its agent, L&S, forwarded the warehouse receipts to the Warehouses with TJC's shipping instructions. Notably, Petitioners fail to disclose that the district court *specifically* found that the undisputed facts establish that TJC was the shipper of the released cotton — not Bankers Trust or its agent, L&S.

(h) At pages 16-19, Petitioners assert that Bankers Trust had actual or constructive notice of the terms of Petitioners' schedules of charges and rules. Neither court below so found; nor does the record support this assertion. Further, Petitioners fail to cite any authority for the proposition that the filing by a warehouse of its schedule of charges and rules with the U.S.D.A. provides constructive notice of the warehouse's charges and rules to a cotton merchant's lender.

(i) Petitioners' argument at pages 18-19 as to what "is clearly understood within the cotton industry" asserts facts not in the record and must be ignored.

(j) Petitioners' argument at page 22 that Bankers Trust recovered "100% of the value of the cotton stored by petitioners" and that "[a]ll funds derived from the sale of the subject cotton to the mills were deposited in Bankers Trust accounts" asserts facts not in the record and must be ignored.

In paragraphs (c), (d), (e), and (f) above, Respondent calls attention to a series of issues that should not be considered by this Court because they were not properly raised and preserved in the lower courts.

REASONS FOR DENYING THE WRIT

I.

PETITIONERS' CLAIMS DO NOT WARRANT REVIEW BY THE UNITED STATES SUPREME COURT.

A. There Is No Federal Question.

The mere fact that fifteen (15) of the twenty-eight (28) Petitioners are federally-licensed warehouses does not elevate this dispute to a federal question. Warehouses are not required to be licensed under the Warehouse Act and only those which choose to be licensed become subject to regulation thereunder. However, a warehouse that elects to be licensed under the Warehouse Act remains subject to the non-conflicting regulations of the state in which it operates. Because of the dual federal/state systems of regulation of warehouses, the Warehouse Act preempts state law only on those matters regulated by the Warehouse Act. *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 237 (1947). In those areas not expressly regulated by the Warehouse Act, state law controls. *Id.*[1]

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1. It is important to note that the regulations promulgated under the Warehouse Act specifically direct a federally-licensed warehouse to state law for collecting unpaid warehouse charges. In pertinent part, 7 C.F.R. § 735.29 provides as follows:

> A licensed warehouseman may demand payment of all accrued charges at the close of each cotton season. If, upon demand, the owner of the cotton refuses to pay such charges at the end of a season, **the warehouseman may take such action to enforce collection of his charges as is permitted by the laws of the State in which the warehouse is located.**

(Cont'd)

Both the district court and the court of appeals properly interpreted the Warehouse Act and applicable state law and held that a secured party acting in a commercially reasonable manner to protect its security interest is not liable for its borrower's debts. As the Warehouse Act does not address or regulate commercial law creditor issues, neither court found a conflict between the Warehouse Act and the UCC. Accordingly, the lower courts correctly applied provisions of the UCC and other state law in rendering their decisions.[2]

B. The Interstate Commerce Act Is Not Relevant.

Instead of addressing the Warehouse Act and regulations promulgated thereunder, Petitioners seek to misdirect the Court's attention to the Interstate Commerce Act ("ICA") and case law interpreting its regulations. Petitioners focus solely on the rules and regulations created by the Interstate Commerce Commission ("ICC") and case law interpreting those ICC regulations with the hope that this Court will somehow transform the ICC regulations into regulations promulgated under the Warehouse Act. Indeed, Petitioners fail to cite any rule or regulation issued pursuant to the Warehouse Act or any case law interpreting the Warehouse Act which contradicts the opinions below.[3]

(Cont'd)

Id. (emphasis added). Inexplicably, in citing and quoting this U.S.D.A. regulation at page 5 of the Petition, Petitioners omitted this key provision which sets forth the law governing a warehouse's collection of its charges.

2. Thirteen of the Petitioners are not federally-licensed, and the Warehouse Act and the regulations promulgated thereunder do not apply to these particular Petitioners. No issues have been raised nor has any argument been advanced that the lower courts misinterpreted state law with respect to these thirteen Petitioners.

3. In the opening sentence of their argument on page 4, Petitioners

(Cont'd)

There is no rational basis, legal precedent or constitutional authority for this Court to apply the statutory and regulatory interpretations of the ICA to the completely dissimilar Warehouse Act. The ICA and case law interpreting former ICC rules and regulations are irrelevant to this case. The ICA is a complex and detailed statutory scheme for the regulation of interstate common carriers and shippers. The plethora of case law involving ICC rate disputes indicates that the ICC closely regulated all aspects of the transactions between common carriers and shippers, including the collection of unpaid charges. None of the parties to this case are common carriers or shippers and the rules and regulations governing the transportation of goods in interstate commerce are not applicable to this case.

C. The United States Courts Of Appeal Are Not In Conflict.

The lower courts, applying well-settled UCC and state common law principles, held that Bankers Trust was not liable for its borrower's debts. There is no split among the United States courts of appeal with respect to claims made by unsecured creditors against secured creditors with facts similar to the case at hand. *See SMP Sales Management, Inc. v. Fleet Credit Corp.*, 960 F.2d 557 (5th Cir. 1992); *A/S Dampskibsselskabet Torm v. Beaumont Oil, Ltd.*, 927 F.2d 713 (2d Cir.), *cert. denied*, 502 U.S. 862 (1991); *Federal Deposit Ins. Corp. v. Quality Inns, Inc.*, 735 F. Supp. 1311 (D. Md. 1990), *aff'd*, 928 F.2d 399 (4th Cir. 1991); *States Marine Int'l, Inc. v. Seattle-First National Bank*, 524 F.2d 245 (9th Cir. 1975).

(Cont'd)

boldly assert that this Court "has consistently decided" that a filed and published warehouse tariff has the enforceability of law. Yet, Petitioners fail to cite even one prior decision of this Court to support this unwarranted assertion. This misleading and inaccurate assertion is illustrative of the numerous examples of the Petition's bold but baseless assertions.

II.

THE COURT OF APPEALS PROPERLY AFFIRMED BANKERS TRUST'S SUMMARY JUDGMENT WHERE THERE WAS NO GENUINE ISSUE OF MATERIAL FACT.

The parties submitted this case to the district court on cross-motions for summary judgment with statements of undisputed facts submitted by each of the parties. The district court concluded that the material facts in this case were not in dispute. Moreover, the district court found that the Petitioners failed to come forward with evidence which would require their claims to be submitted to a jury. Accordingly, the district court properly granted summary judgment to Bankers Trust, which judgment was affirmed by the court of appeals. As a matter of law, "summary judgment is appropriate when, after being given a reasonable opportunity to substantiate its claims, the nonmoving party is unable to establish any essential element of its case on which it will have the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 321 (1986).

In this case, the lower courts have not deviated from the accepted and usual course of judicial proceedings by awarding summary judgment to Bankers Trust. The lower courts properly stated and applied accepted rules of law to dismiss the Petitioners' claims. Petitioners simply refuse to accept the lower courts' factual findings in this case. Petitioners' unwillingness to accept such findings is hardly a compelling reason for this Court to grant Petitioners' writ for certiorari.

CONCLUSION

The Petition does not present any questions that warrant review by this Court, and there are no compelling reasons for this Court to issue a writ of certiorari. Accordingly, this Court should deny the Petition for Writ of Certiorari.

Respectfully submitted,

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